80-1419

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ALEXANDER L. S
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ETHEL HAMILTON

Petitioner

vs.

WILFORD STOVER

Respondent

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

BENJAMIN B. SHEERER
PAULA GOODWIN
614 Superior Avenue, West
Suite 611
Cleveland, Ohio 44113
(216) 241-3646

Attorneys for Petitoner

SUPREME COURT of the UNITED STATES

Term October, 1980

No.

ETHEL HAMILTON

Petitioner

vs.

WILFORD STOVER

Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner Ethel Hamilton prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on November 24, 1980 in Case No. 79-3562 on the docket of that Court.

QUESTIONS PRESENTED FOR REVIEW

1. Do allegations of willful, reckless, deliberately indifferent or grossly negligent

conduct on the part of a municipal police officer acting within the scope of his authority state a cause of action under 42 USC § 1983 and 28 USC § 1343?

2. Do allegations of willful, reckless, deliberately indifferent or grossly negligent conduct on part of municipal police officer in violation of the constitutional rights to life, liberty and personal security state a cause of action under the United States Constitution and 28 USC § 1331?

PARTIES TO THE PROCEEDING

The caption of the case sets forth all parties to this proceeding. Petitioner Ethel Hamilton appears as Administratrix of the estate of Glen Hamilton, as his surviving spouse and as parent and legal guardian of his surviving children.

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OPINIONS BELOW

The order of the Federal District Court for the Northern District of Ohio, Western Division, is reproduced at Appendix B. The order of the Sixth Circuit Court of Appeals is reproduced at Appendix A.

JURISDICTION

The decision sought to be reviewed is that of the Sixth Circuit Court of Appeals filed November 24, 1980. No rehearing by the Court of Appeals nor extension of time in which to file this Petition have been sought.

The statutory provision conferring on this Court jurisdiction to review the decision is 28 USC § 1254 and 28 USC § 2101 (c).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting as establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV

Section I - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. STATUTES

28 USC § 1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or

treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof or any officer or employee thereof in his official capacity.

28 USC § 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 USC § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I. NATURE OF CASE

This is an action to redress by damages the wrongful death of Glen Hamilton, the husband of petitioner, Ethel Hamilton, and the father of

her children. Glen Hamilton's death was directly caused by respondent Wilford Stover a policeman employed by the Village of Plymouth, Ohio while Mr. Stover was on duty. The complaint invoked the provisions of 28 USC §§ 1331, 1343 and 42 USC § 1983 and the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

II. STATEMENT OF FACTS

The events that form the basis of this action occurred on Saturday evening, April 15, 1978, in the Village of Plymouth, Ohio, when the decedent Glen Hamilton went out to pick up a pizza for his family. Upon his return home, he began a proper and lawful left hand turn into his driveway. As his automobile began to enter his driveway, but before it left the roadway, it was struck broadside by another vehicle. The impact drove his automobile sideways many feet and killed Mr. Hamilton.

The other vehicle was a Village of Plymouth police car driven by the respondent police-

man while on duty. The complaint alleges that respondent drove in a manner which was willful, reckless, grossly negligent and deliberately indifferent. The basis of these allegations is that at the time of the impact the police car was proceeding on the wrong side of the road, at a speed far in excess of the posted speed limit and without the proper warning device required by Ohio law.

Mr. Hamilton left surviving him his wife and four minor children. On March 26, 1979, Ethel Hamilton, suing as Glen Hamilton's personal representative and as his surviving wife, filed an amended complaint in the Federal District Court of Northern Ohio alleging that the actions of respondent deprived Mr. Hamilton of his rights to life and personal security and to travel the public streets. (Set forth at Appendix C.) On behalf of herself Mrs. Hamilton pleaded that she had lost the husband and marriage of her choice. On behalf of their children she pleaded that they were deprived of the

care, support and affection of their father.

III. DISPOSITION BY COURTS BELOW

On April 23, 1979, prior to filing an Answer, the respondent filed a Motion to Dismiss pursuant to Civil Rule 12 (B) (1) and (6). Plaintiff responded with a brief in opposition. On June 21, 1979, the District Court entered an order dismissing the cause "without prejudice". The order contained no citation of authority for the dismissal nor any discussion of the basis for its holding other than its assertion that the Federal District Court has no jurisdiction over intrastate torts.

On July 20, 1979, petitioner filed her notice of appeal to the Sixth Circuit Court of Appeals. Said appeal was docketed on August 29, 1979, and timely briefs were filed by both sides. The case was referred to a panel of the court, pursuant to the Sixth Circuit's Court Rule 9 (a), and an order was issued without affording the parties oral argument. The Circuit Court affirmed the dismissal by the District Court, finding

that petitioner had failed to state a claim for relief. The order states,

> Although plaintiff has alleged that the conduct was in reckless disregard of decedent's safety, we do not believe that this isolated incident of negligence rises to the level of a constitutional tort. (Citing Walton v. Salter, 547 F 2d 824 (5 Cir. 1976).

REASONS FOR GRANTING THE WRIT

I. ALLEGATIONS OF WILLFUL, RECKLESS, DELIBERATELY INDIFFERENT AND/OR GROSSLY NEGLIGENT CONDUCT BY A MUNICIPAL POLICE OFFICER RESULTING IN THE DEPRIVATION OF CONSTITUTIONAL LIBERTIES STATE A CAUSE OF ACTION UNDER 42 USC § 1983 and 28 USC § 1343.

The Sixth Circuit Court of Appeals affirmed the District Court's dismissal of the complaint in this case on the ground that an "isolated incident of negligence" is not actionable under 42 USC § 1983 and 28 USC § 1343. The issue of what degree of misconduct is required in order to establish a cause of action under 42 USC § 1983 is one which this Court has had before it on several occasions but has yet to resolve. The statute itself does not indicate that any particular type of conduct is required.

In 1977 this Court granted certiorari in the case of Procunier v. Navarette, 434 US 555 (1978) to determine whether allegations of negligence by state prison officials were sufficient to state a claim under 42 USC § 1983. The Court did not reach the issue because it found it necessary to dispose of the case on another ground.

In 1978 the Court accepted two cases which again appeared to raise the issue: Baker v. McCollum 443 US 137 (1979) and Martinez v. California, 444 US 277 (1980). In Baker the Court decided:

> The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the Constitution and laws." We think that respondent has failed to satisfy this threshold requirement of § 1983 and thus defer once again consideration of the question whether simple negligence can give rise to § 1983 liability.

443 US at 140. In Martinez the Court also found that the threshold requirements of 42 USC § 1983 were not met, there being insufficient state involvement for the deprivation to have been under color of state law.

In the instant case, both threshold requirements are met. The petitioner alleged deprivations of her decedent's life, personal security and right to travel the public streets, all well-recognized constitutionally protected rights. Also alleged are deprivations of his surviving wife and children's right to marriage, nurture, care, and affection in their family life as protected by the Fourteenth Amendment's guarantee of liberty. Kelley v. Johnson, 425 US 238, 244 (1976); Roe v. Wade, 410 US 113 (1973); Eisenstadt v. Baird, 405 US 438 (1972); Stanley v. Illinois, 405 US 645 (1972); Griswold v. Connecticut, 381 US 479 (1965); and Meyer v. Nebraska, 262 US 390 (1923).

The particular action complained of here was that of a municipal police officer while acting in the scope of his employment. It was as a direct consequence of his operation of a Village police car that Petitioner's decedent was killed. Thus the requirements as set forth

in Baker v. McCollum and Martinez v. California are met.

Furthermore, this is not a case as in Procunier where an official immunity can be set forth as a defense to liability for the federal claim. The respondent argued below that the State of Ohio has enacted a statutory immunity from liability for police officers who cause injury to individuals while responding to an emergency call. The respondent has asserted that he was responding to a call when he caused Glen Hamilton's death. As the Supreme Court noted in Martinez:

> Conduct by persons acting under color of state law which is wrongful under 42 US § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. (Citing Hampton v. City of Chicago, 484 F 2d 602, 607 (7th Cir. 1973), cert. den. 415 US 917)

444 US at 284, fn 8.

This Court has held that police officers

enjoy a limited federal immunity for acts performed in the course of their duties where they are based upon good faith and probable cause. Pierson v. Ray, 386 US 547 (1967). In the instant case, the respondent acted not in good faith but with wanton disregard for the safety of the public in general and of Glen Hamilton in particular. Furthermore, while state law shields him from liability when responding to an emergency call, the state also requires him to take certain precautions, such as warning devices and due care, which in this case the respondent failed to observe.[1] Thus, unlike Pierson where the officers were following state law when the deprivation occurred, here the

[1] The state statute granting immunity has been upheld by state courts under even the most egregious situations. See Agnew v. Porter, 23 Ohio St. 2d 18 (1970) and McDermott v. Irwin, 148 Ohio St. 67 (1947).

Based upon this Court's discussion of the state immunity issue in Martinez v. California, supra, we believe the statute would also pass constitutional muster.

respondent acted contrary to specific requirements of state law.

The Court presently has before it another case which raises the issue of whether simple negligence can form the basis of a cause of action under 42 USC § 1983. That case is Parratt v. Taylor, No. 79-1734, cert. granted October 20, 1980. Parratt, however, merely raises the question of simple negligence, and the Court will review whether negligence was proven at all. This case, on the other hand, raises questions of willful, reckless, and grossly negligent conduct on the part of a municipal police officer in direct disregard of the requirements of state law. Thus a decision in the instant case will help to define more clearly the degree of misconduct necessary to state a cause of action under 42 USC § 1983.

In addition, there are issues raised in Parratt v. Taylor which may again necessitate a resolution based on other grounds. The Court

has granted review on the issue of whether certain types of property are so de minimis as to not be protected by the Fourteenth Amendment. The property lost in Parratt is valued at $23.57. The Court has also granted review on the issue of whether the existence of a state tort claims remedy satisfies the requirements of the Due Process Clause of the Fourteenth Amendment.

In this case no such alternative issues present themselves for review. The loss of the life of a young family provider is without doubt of substantial value. And, as discussed above, the state has chosen to preclude any state tort remedy to his surviving family.

The only issue presented for review then is whether allegations of willful, reckless, deliberately indifferent or grossly negligent conduct can form the basis of a cause of action under 42 USC § 1983.

Petitioner believes the issue is important and, in view of this Court's previous efforts to

resolve it, petitioner believes this case lends itself to the Court's concern to reach the issue.

II. ALLEGATIONS OF WILLFUL, RECKLESS, DELIBERATELY INDIFFERENT AND/OR GROSSLY NEGLIGENT CONDUCT BY A MUNICIPAL POLICE OFFICER RESULTING IN DEPRIVATION OF CONSTITUTIONAL LIBERTIES STATE A CAUSE OF ACTION UNDER THE UNITED STATES CONSTITUTION AND 28 USC § 1331.

In Petitioner's Amended Complaint, a cause of action was also alleged directly under the United States Constitution and jurisdiction under 28 USC § 1331 was invoked. The Sixth Circuit and the District Court apparently found that the facts as pleaded were insufficient to state a claim under the Constitution.

This Court has recognized actions arising directly under the Constitution since its decision in Bivens v. Six Unknown Federal Narcotics Agents, 403 US 388 (1971). The vindication of constitutional violations by way of a federal suit for damages under 28 USC § 1331 was reaffirmed last term in Carlson v. Green, ___US _____, 48 USLW 4425 (April 22, 1980). However, no case similar to this has yet been decided

by this Court.

Many cases have recognized the right of individuals to sue for violations by state officials of their constitutional rights. As the Sixth Circuit stated on another occasion:

> .....it is well established that municipalities, councils and commissions may be sued directly for fourteenth amendment violations through the general federal question jurisdictional statute, 28 USC § 1331. (Citing Kenosha v. Bruno, 412 US 507 (1973), Hanna v. Drobnick, 514 F 2d 393 (6th Cir. 1975) and Bosely v. City of Euclid, 496 F 2d 193 (6th Cir. 1974).

Amen v. City of Dearborn, 532 F 2d 554, 559 (6th Cir. 1976).

This Court has identified several considerations for whether a Bivens type action is to be permitted. Of primary importance is the existence or lack thereof of other remedies. Davis v. Passman, 442 US 228, 242 (1979). As discussed previously, the State of Ohio has chosen to preclude any state remedy to Ethel Hamilton and her children. Should this Court uphold the denial of a remedy under 42 USC §

1983, then Glen Hamilton's surviving family will have no means of redress without consideration of an action arising directly under the Constitution.

There are factors which may make a Bivens action more appropriate here than one under § 1983. One of these is that § 1331 has the $10,000 jurisdictional limit, thus preventing federal litigation of trivial claims which has been of concern to many courts. See Parratt v. Taylor, No. 79-1734, cert. granted October 20, 1980; Walton v. Salter, 547 F 2d 824 (5th Cir. 1976).

In summary, this Court has never addressed the issue of whether a willful, reckless, deliberately indifferent or grossly negligent violation of constitutional rights can give rise to an action for damages under the general federal question provision for federal jurisdiction. Should the Court uphold the previous decisions in this case that there is no cause of action

under 42 USC § 1983, then the petitioning Hamilton family will have no other redress for the loss of their father and violation of their First, Fourth, Ninth and Fourteenth Amendment rights. In Davis v. Passman, supra, this Court said:

> Unless such (constitutional) rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. 442 US at 242

Petitioners request that the Court agree to consider their claim for a cause of action that will permit them to redress Glen Hamilton's death.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN B. SHEERER
PAULA GOODWIN
614 Superior Avenue, W.
Suite 611
Cleveland, Ohio 44113
(216) 241-3646

Attorneys for Petitioner

SERVICE

Three copies of this Petition for Certiorari have been sent by regular U. S. mail to the Attorney for Respondent, Richard A. Hamilton, 455 Spitzer Building, Toledo, Ohio 43604, on this ___day of February, 1981.

BENJAMIN B. SHEERER

APPENDICES

APPENDIX A

No. 79-3562

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ETHEL HAMILTON, AS ADMINISTRATRIX OF THE ESTATE AND SURVIVING SPOUSE OF: GLEN HAMILTON, DECEASED,	:	
Plaintiff-Appellant	:	ORDER
vs.	:	
WILFORD C. STOVER,	:	
Defendant-Appellee	:	
BEFORE: ENGEL, MERRITT and KENNEDY, Circuit Judges.	:	

This appeal has been referred to a panel of the court pursuant to Rule 9 (a), Rules of the Sixth Circuit. After examination of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule 34 (a), Federal Rules of Appellate Procedure.

Plaintiff is the widow and administra-

trix of the estate of Glen Hamilton, a decedent. Hamilton was killed when his car was struck by a police vehicle operated by defendant Stover. Stover was responding to an emergency call at the time. Plaintiff filed a civil rights action for damages under 42 U.S.C. §1983 and 28 U.S.C. §§1331, 1343. The complaint alleged that defendant's conduct was grossly negligent and reckless and deprived plaintiff, her children and the decedent of their constitutional rights under the first, fourth, ninth and fourteenth amendments. Defendant moved to dismiss the action under Rule 12 (B) (1) and (6), Federal Rules of Civil Procedure. The motion was granted and the complaint was dismissed without prejudice so that plaintiff could pursue her state remedies. Plaintiff appeals from this judgment of dismissal.

Upon consideration, the Court finds that plaintiff has failed to state a claim for relief under the civil rights statute of the Con-

stitution. Not every state-inflicted injury gives rise to a federal cause of action. Only conduct which deprives an individual of rights, privileges or immunities secured by the Constitution and laws of the United States can be the basis for relief under federal law. Paul v. Davis, 424 U.S. 693 (1976); Havas v. Thornton, 609 F. 2d 372 (9th Cir. 1979); Beard v. Mitchell, 604 F. 2d 485 (7th Cir. 1979). Although plaintiff has alleged that the conduct was in reckless disregard of decedent's safety, we do not believe that this isolated incident of negligence rises to the level of a constitutional tort. Walton v. Salter, 547, F. 2d 824 (5th Cir. 1976).

Because the questions upon which the decision of this cause depends are so unsubstantial as not to require further argument, it is ORDERED that the judgment of the district court be, and it hereby is, affirmed. Rule 9 (d) 3, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ETHEL HAMILTON, etc.	:	
	:	
Plaintiff,	:	No. C 79-177
	:	
vs.	:	
	:	DISMISSAL ORDER
WILFORD C. STOVER,	:	
	:	
Defendant	:	

This cause is before the Court on defendant's motion to dismiss for want of subject matter jurisdiction, and for failure to state a claim upon which relief can be granted. The plaintiff opposes.

Plaintiff Ethel Hamilton is an Administratrix of the Estate of Glen Hamilton, deceased. Defendant Wilford C. Stover is a police officer on duty. All are residents of Willard, Ohio, thus defeating diversity jurisdiction.

This cause of action is based on plaintiff's

decedent death resulting from alleged negligent or willful and wanton misconduct on the part of the defendant in operating a police vehicle while on duty (whether or not an "emergency" existed, invoking the immunity provided by Ohio Rev. Code §701.02, is a question of fact).

Plaintiff seeks to claim that the right to use the public highways and be free from bodily injury is clearly a federally and constitutionally protected right. The Court cannot but agree that the right to life is the most cherished guarantee in the scheme of freedom and constitutional government.

However, it was not in the congressional scheme to place every bodily injury in the District Court's jurisdiction by the enactment of specific statutes, particularly 42 U.S.C. §1983, and 28 U.S.C. §1331. Plaintiff quotes many § 1983 decisions out of context to develop an argument, but the basic premise of no jurisdiction in intrastate tort action persists.

Accordingly, this cause is dismissed without prejudice to pursuing the proper state remedies, and to refiling if the proper constitutional deprivation of facts develop.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

Toledo, Ohio.

June 21, 1979.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ETHEL HAMILTON, As Administratrix of the Estate and Surviving Spouse of: GLEN HAMILTON, Deceased: and as Guardian of: Harold Dean Hamilton, Forrest Hamilton, Jeanette Hamilton, Tanya Hamilton, all minors, Lamar Court, Rte. 2 Willard, Ohio 44890	CASE NO. C79-177
	JUDGE WALINSKI
	AMENDED COMPLAINT
	JURY DEMAND ENDORSED HEREIN
Plaintiff	
vs.	
WILFORD C. STOVER 154 Beelman Plymouth, Ohio 44865	
Defendant	

JURISDICTION

1. This court has jurisdiction of the parties and subject matter pursuant to 42 USC Section 1983; 28 USC Sections 1331 and 1343; and the First, Fourth, Ninth and Fourteenth

Amendments to the United States Constitution.

PARTIES

2. Plaintiff is the widow of the deceased Glen Hamilton. She is also the Administratrix of his estate and his personal representative having been granted Letters of Administration by the Court of Common Pleas, Probate Court Division, Richland County, on March 16, 1979, in Case No. 41502. She also is the mother and guardian of Glen Hamilton's four surviving minor children, and she brings this action, in part, on their behalf.

3. Defendant, Wilford Stover, is a patrolman in the police department of Plymouth, Ohio. All the actions of the defendant hereafter described were undertaken under color of law and while defendant was acting as a patrolman for the Village of Plymouth, Ohio.

FIRST CAUSE OF ACTION

4. At the time of the events here-in Glen Hamilton was a resident of Plymouth, Ohio, residing at 197 Trux Street, Plymouth, Ohio 44865. This address is within the Village limits and is a residential area.

5. On or about April 15, 1978, Glen Hamilton went to a restaurant to buy a pizza to bring home to his family. On his way home and as he was turning left on Trux Street into his own driveway, he was struck by a Village of Plymouth police vehicle operated by Defendant Stover, while on duty as a patrolman. As a result of this collision, Glen Hamilton's automobile was driven sideways many feet and he was killed.

6. At the time of the collision, Defendant Stover was operating his vehicle at a speed greatly in excess of the Village speed limit, on the wrong side of the road, and without using the warning equipment required by Ohio law. Defendant Stover was grossly negligent and was acting in a

willful and reckless manner. He was operating his vehicle with deliberate indifference to the foreseeable consequences.

7. Defendant Stover's grossly negligent, willful, reckless, and deliberately indifferent actions violated Glen Hamilton's constitutional right to the security of his person and life, his right to travel the public streets without hindrance or harm, and his right to equal protection of the law. Defendant Stover knew or should have known his actions would violate Glen Hamilton's constitutional rights. This conduct was in such disregard of Glen Hamilton's constitutional rights that it cannot be characterized as being in good faith.

8. Glen Hamilton left surviving him the following persons who were dependent upon him for support, for whose benefit this action is brought, and by reason of his death, suffered pecuniary injury:

Ethel Hamilton (wife)
Harold Dean Hamilton (son, age 14)

Forrest Hamilton (son, age 13)
Jeanette Hamilton (daughter, age 10)
Tanya Hamilton (daughter, age 5)

9. This action is brought within two (2) years of the death of Glen Hamilton.

10. Reasonable funderal expenses in the amount of Two thousand four hundred forty and 96 cents ($2,440.96) were incurred.

SECOND CAUSE OF ACTION

11. Plaintiff incorporate by reference all allegations previously set forth.

12. Defendant Stover's grossly negligent, willful, reckless, and deliberately indifferent actions violated Ethel Hamilton's constitutionally protected rights to privacy, security, and freedom of association in depriving of her of her husband, her marriage and of her chosen family life. Defendant Stover knew or should have known his actions would violate Ethel Hamilton's constitutional rights. This conduct was in such disregard of Ethel Hamilton's constitutional rights that it cannot be characterized as being in good faith.

THIRD CAUSE OF ACTION

13. Plaintiff incorporate by reference all allegations previously set forth.

14. Defendant Stover's grossly negligent, willful, reckless, and deliberately indifferent actions violated Glan Hamilton's four surviving children their constitutionally protected rights to privacy, security and freedom of association in depriving them of their father, his support and affections, and their way of life. Defendant Stover knew or should have known his actions would violate their constitutional rights. This conduct was in such disregard of the children's constitutional rights that it cannot be characterized as being in good faith.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment in the amount of Five Hundred Thousand Dollars ($500,000.00), her costs herein, her attorney's

fees and such other relief as may be appropriate.

BENJAMIN B. SHEERER
614 Superior Avenue W.
Suite 611
Cleveland, Ohio 44113
(216) 241-3646

PAULA GOODWIN
614 Superior Avenue W.
Suite 611
Cleveland, Ohio 44113
(216) 241-3646

Attorneys for Plaintiff

SERVICE

A copy of this amended complaint has been mailed postage paid to defendant this 6th day of April, 1979.

BENJAMIN B. SHEERER
Attorney for Plaintiff

MAR 20 1981

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1419

ETHEL HAMILTON,

Petitioner,

– v –

WILFORD STOVER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

RICHARD A. HAMILTON
Metzger & Hamilton
455 Spitzer Building
Toledo, Ohio 43604
Telephone: (419) 244-8393
Attorney for Respondent.

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IN THE

October Term, 1980

No. 80-1419

ETHEL HAMILTON,

Petitioner,

– v –

WILFORD STOVER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States.

STATEMENT OF THE CASE

I. NATURE OF CASE

This action arose out of an automobile collision between Wilford Stover, a policeman employed by the Village of Plymouth, Ohio, on duty at the time of the accident, and plaintiff's decedent, Glen Hamilton. At the time of the collison, Officer Stover was responding to an emergency call in the course of his duties when decedent caused his vehicle to turn into the path of the automobile driven by Stover. Petitioner is now seeking to invoke the provisions of 28 USC §1331 and §1342, 42 USC §1983, and the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

II. STATEMENT OF FACTS

The events that formed the basis for this action occurred on Saturday evening, April 15, 1978 in the Village of Plymouth, Ohio, when Wilfred Stover, a policeman employed by the Village of Plymouth received an emergency call transmitted over the radio in the vehicle he was driving while he was on duty. The call referred to a man trapped in an automobile that was on fire, and Officer Stover immediately responded to the call, turned on his emergency equipment and proceeded to the scene of the occurrence. As he was proceeding under emergency conditions, decedent Glen Hamilton turned his vehicle into the path of the vehicle driven by Officer Stover and a collision occurred.

Petitioner is Mr. Hamilton's widow who filed suit as his personal representative pursuant to Ohio Law. She has claimed that her deceased husband's rights under 42 USC §1983 were violated as a result of this automobile collision as stated in the Petition for a Writ of Certiorari. The United States District Court for the Northern District of Ohio, Western Division sustained Respondent's Motion to dismiss and this decision was affirmed by the United States Court of Appeals for the Sixth Circuit without hearing. The opinions of these Courts have been included as Appendices A and B in the Petition for Certiorari.

REASON FOR NOT GRANTING THE WRIT

I. MERE ALLEGATIONS OF WILLFUL, RECKLESS, DELIBERATELY INDIFFERENT AND/OR GROSSLY NEGLIGENT CONDUCT BY A MUNICIPAL POLICE OFFICER

ARE NOT SUFFICIENT TO STATE A CAUSE OF ACTION UNDER 42 USC §1983, 28 USC §1343, 28 USC §1331 AND THE UNITED STATES CONSTITUTION.

Petitioner has advanced two reasons for granting the Writ of Certiorari. Because these two reasons are intertwined, Respondent will treat them as one for the purposes of this Brief.

The United States District Court for the Northern District of Ohio, Western Division and the Sixth Circuit Court of Appeals have held that the allegations contained in Petitioner's complaint, based on the factual situation involved, do not give rise to a cause of action under 42 USC §1983. Petitioner herein has admitted in her Petition that the police officer was acting in the scope of his employment during an emergency run in aid of a person, other than Petitioner's decedent, who was in need of assistance, and that his action was pursuant to §701.02 of the Ohio Revised Code, which reads:

> "Members of the police department engaged in the operation of a motor vehicle responding to an emergency call: . . . Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call."

Petitioner has admitted that this section applies to the case now before the Court.

Petitioner further admits that under the cases of *Agnew v. Porter*, 23 Ohio St. 2d 18, 260 NE 2d 830 (1970) and *McDermott v. Irwin*, 148 Ohio St. 67, 73 NE 2d 86 (1947) that the Supreme Court of Ohio has upheld this statute under conditions similar to those presented here.

In *Agnew*, the Ohio Supreme Court held that Ohio Revised Code §701.02 was a full defense to any action for damages for personal injury against a policeman for negligence while engaged in the operation of a motor vehicle responding to an emergency call. Further, the Court held that the officer is not required to determine whether or not the call is an emergency. The officer is entitled as a matter of law to accept the call at face value and has no duty to independently determine whether or not an actual emergency exists or to question the judgment of the officer issuing such message.

The *McDermott* case, in particular, is parallel to the case now before the Court. In *McDermott*, the plaintiff received injuries while

a passenger in an automobile which was struck by a City of Youngstown ambulance. The claim was that the ambulance failed to sound the siren, whistle or bell and came through a red light on the wrong side of the highway. The Court held that the immunity clause, based on the emergency statute, was fully applicable, stating that the reasoning behind this was sound because the State had a great interest in whether or not emergency runs are made by its officials and police officers. The immunity granted by the statute far overrides any potential loss that may be suffered by abuse of this process because criminal sanctions are still available against the officer or individual who violated any state laws while making an emergency run. The state of Ohio merely hopes to cloak the officers while in the scope of an emergency with immunity from civil harassment. This is surely within the parameters of the police protection of the general public.

The Ohio immunity statute seeks to protect officers, while in the scope of their duty who are attempting to aid members of the general public, from suits by individuals who may be injured indirectly as the result of police response to an emergency situation. In the case now before the Court, Officer Stover did not direct his actions toward the decedent, but rather toward aiding an individual who was in an emergency situation. Under these circumstances, he should be entitled to the immunity given him by the Ohio statute.

Petitioner is now seeking to circumvent this immunity provision of the Ohio law by attempting to bring this cause of action under the Fourteenth Amendment to the United States Constitution and, in particular, 42 USC §1983, the Civil Rights Legislation evolving after the Civil War. Prior to discussing the effect of §1983, Respondent must point out that Petitioner has yet to seek redress in Ohio Courts to determine whether the immunity clause of §701.02 of the Ohio Revised Code applies rather as stated in her Brief. She admits its validity, an admission in essence, therefore, that she is seeking §1983 relief in order to circumvent the provisions of the Ohio Revised Code.

The proper course would be for Petitioner to test whether or not an emergency run was being made and whether or not the coverage provided by Ohio Revised Code §701.02 really does, in fact, apply to the accident in question. Further, by doing so, if Petitioner felt that §701.02 is too broad an immunity or that the immunity granted is unconstitutional, those matters could

be tested in the proper manner — first in Ohio Courts and then, if necessary, to the United States Supreme Court. Petitioner has not chosen this manner in which to proceed, but rather is, in the numerous cases cited out of context, attempting to argue that §1983 applies to any action by state officials, regardless of how or what occurs, and against whom said action is directed.

It is more than obvious from examining the case law under 42 USC §1983, that this was not the purpose or import of the act. Petitioner is attempting to bring this case under the scope of 42 USC §1983 claiming that an automobile accident involving a state official would deprive a party of his rights under the Fourteenth Amendment. There is no allegation in the complaint that the acts committed or alleged to have been committed by the Respondent Stover were acts directed, under color of law, against Petitioner's decedent. The only acts alleged against Stover were that he was grossly negligent in the driving of his police vehicle and, as admitted in Petitoner's Brief, was on an emergency run. If, in fact, these allegations were true, Officer Stover would be subject to criminal penalties under Ohio law. However, in furtherance of the protection of the general public, the State of Ohio has seen fit to grant immunity to such police officers while in the course of an emergency run, feeling that this far overrides the potential danger of said officers in abusing their driving privileges. Stover's acts were not designed to affect decedent or deprive him of any of his constitutionally protected rights; rather his acts were those of an officer responding to an emergency call and seeking to give help to a person in dire need.

The Courts have long given recognition to limited immunity for public officials. We call the Court's attention to the case of *Denman v. Leedy*, 479 F. 2d 1092 (1973). *Denman* involved a domestic squabble and plaintiff Denman brought an action under 42 USC §1983 against the Clerk of Courts for Wooster, Ohio, and other people. The allegations against the Clerk were that he failed to set bail pursuant to Ohio statutes and thereby denied Denman his rights of freedom and bail. The Court of Appeals, in dismissing this action under §1983, said the defendant Clerk was within the scope of his official quasi-judicial duties and was entitled to immunity.

This Court, in the case of *Scheuer v. Rhodes,* 416 U.S. 232, 40 L Ed. 2d 90, 94 S. Ct. 1683 (1974), the "Kent State" case, held that the concept of executive immunity of public officials assumes that they may err and that it is better to risk some error and possible injury from such error than not to decide whether to act at all, for the public interest requires decisions and action to enforce laws for the protection of the public. Clearly, that is the reason for granting police officers immunity for emergency runs under the Ohio statute. It would be a terrible thing if an officer would have to worry about being sued every time he responded to an emergency situation on the highways, and the public would suffer greatly if the officers did not respond quickly.

Respondent would also like to call the Court's attention to the case of *Baker v. McCollan,* 443 U.S. 137, 61 L Ed. 2d 450, 99 S. Ct. 2710 (1979), a case cited by Petitioner. In *Baker v. McCollan,* the plaintiff's brother had falsely obtained a duplicate of plaintiff's driver's license and subsequently was arrested for a violation. He gave as his identification the falsely obtained driver's license, was subsequently released on bond, and forfeited same. The plaintiff Baker was subsequently arrested for his brother's crime based on identification given by the falsified driver's license and was detained for a period of seven (7) days. Suit was brought under 42 USC §1983, claiming that the arrest and detention were in violation of the Fourteenth Amendment. This Court held that the Fourteenth Amendment does not protect against all deprivations of liberty, but only those deprivations accomplished "without due process of law." The Court further held that the sheriff or custodian is not expected to conduct an independent investigation into every arrest made pursuant to a warrant, but rather that he had a right to rely on the fact that the warrant was legal on its face. The Court held that the tort of false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant was a state official.

Also, in the case of *Butz v. Economu,* 438 U.S. 478, 57 L Ed. 2d 895, 98 S. Ct. 2894 (1978), the Department of Agriculture unsuccessfully tried to revoke or suspend respondent's registration as a commodities futures company. Suit was brought against Butz and others within the Department and the Court

held that officers may have immunity where necessity of job protection overrides the possible damage done or which might be done from abuse of the authority granted to the officers where the rights of the general public are to be protected.

In addition, the Courts have held that in order to bring a claim under 42 USC §1983, that it is essential that a claim must show that the plaintiff suffered deprivation of a federally protected right, privilege or immunity as the result of the alleged action taken by the defendant. See *Orr v. Trinter,* Court of Appeals, (6th Cir. 1971) 444 F. 2d 138, certiorari denied 408 U.S. 943, 92 S. Ct. 2847, 33 L Ed. 2d 767, rehearing denied 409 U.S. 898, 93 S. Ct. 95, 35 L Ed. 2d 157 (1971). Appellant has filed only a complaint setting forth the fact that an automobile accident occurred and has attempted to obscure the facts therein by claiming wanton and willful misconduct. There is no showing in the complaint on its face that the defendant has violated any constitutional right of the decedent and under the reasoning of *Orr v. Trinter,* the complaint rightfully was dismissed.

In addition, *Henig v. Odorioso,* 385 F. 2d 491, certiorari denied 390 U.S. 1016, 88 S. Ct. 1269, 12 L Ed. 166, rehearing denied 391 U.S. 929, 88 S. Ct. 1814, 20 L Ed. 2d 671 (1968), held that it is necessary to show that the force or power used was directed at the particular defendant and denied him due process of law. In this case, Officer Stover directed no particular action at the decedent, but was rather in the course and scope of an emergency run and was involved in an automobile collision with the decedent. Clearly, under *Henig,* no violation of the decedent's constitutionally protected rights occurred.

The Court of Appeals for the Sixth Circuit, in deciding this case in favor of Respondent, followed the decision of the Fifth Circuit in *Walton v. Salter,* 547 F. 2d 824 (5th Cir. 1976). In *Walton,* the widow of a pedestrian who was struck and killed by a police car while responding to the call of an armed robbery in progress, filed a Civil Rights Action for damages against the police officer. The District Court dismissed the complaint for lack of federal jurisdiction holding that a negligence action does not provide a basis for federal jurisdiction under 42 USC §1983. The Fifth Circuit Court of Appeals, in affirming the District Court, held:

> "We affirm the District Court on the narrow ground that the complaint in this case simply does not assert the theory advanced by plaintiff before us. It states only that the actions of the officers in the city with respect to the Walton accident are negligent and in willful and wanton disregard for the safety of others."

Very similar language was used by Petitioner in this case. The Court went on to state:

> "Plaintiff therefore has failed to plead the claim that she asserts is sufficient under §1983 and instead has pleaded one which she concedes cannot be the basis of federal jurisdiction: an isolated act of negligence."

This Court, in the case of *Martinez v. California*, 444 U.S. 277, 62 L Ed. 2d 481, 100 S. Ct. 553 (1980) has reaffirmed this position. In *Martinez*, Appellant's decedent, a 15 year old girl, was murdered by a parolee five months after his release from prison despite his history as a sex offender. Suit was brought in a California Court under state law and under 42 USC §1983 claiming that the decedent was subjected to a deprivation of her life without due process of law and that the state officials were, therefore, liable in damages for the harm caused by the parolee. This Court held that the California immunity statute is not unconstitutional when applied to defeat a tort claim arising under state law. This Court, in discussing the California statute, said:

> "This statute merely provides a defense to potential state tort liability. At most, the availability of such a defense may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might. But the basic risk that repeat offenses may occur is always present in any parole system. Legislative decisions that have an incremental impact on the probability that death will result in any given situation — such as setting the speed limit at 55 M.P.H. instead of 45 — cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander."

The Ohio immunity statute has merely set this protection for its police officers while on emergency runs. It is clear then that the Sixth Circuit Court of Appeals was correct in sustaining the dismissal of the complaint filed by the Petitioner in the United States District Court.

The cases cited by Petitioner in support of her Petition are distinguishable from the matter before the Court. These cases will be

examined and discussed in alphabetical order.

Amen v. City of Dearborn, 532 F. 2d 554 (6th Cir. 1974) raised a jurisdictional question, the issue being whether all of the plaintiffs had a claim in excess of $10,000.00. The decision of the Court was on that issue of jurisdiction.

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 29 L Ed. 2d 619, 91 S. Ct. 1999 (1971) arose from a complaint against a defendant who, acting under color of federal authority, made a warrantless entry of plaintiff's apartment, searched it, and arrested him for a narcotics violation. This Court found no probable cause for the entry and held that plaintiff was deprived of Fourth and Fourteenth Amendment rights. Defendants' acts, in contrast to the matter now before the Court, were directed only against the individual plaintiff.

Bosely v. City of Euclid, 496 F. 2d 193 (6th Cir. 1974) was a class action brought by tenants of a municipally-owned low income housing project against the city and its officials, and raised a jurisdictional question. The Court found that it had jurisdiction over the defendants but held that the appellants had failed to demonstrate a "legitimate claim of entitlement" under 42 USC §1983.

Carlson v. Green, ____ U.S. ____, 48 U.S. L. W. 4425 (April 22, 1980) was an action brought in the District Court for Indiana on behalf of a decedent prisoner who allegedly died as the result of prison officials' failure to provide him with proper medical attention. Defendants contended that an action under 42 USC §1983 was precluded by the Federal Tort Claims Act. This Court held that there was jurisdiction under 42 USC §1983 which was not preempted by the Federal Tort Claims Act against this class of federal employees.

Davis v. Passman, 442 U.S. 228, 60 L Ed. 2d 846, 99 S. Ct. 2264 (1979) was a sex discrimination case in which the plaintiff claimed that Congressman Passman had discriminated against her by reason of sex. The Court held that a proper case of sex discrimination had been pleaded and, therefore, because this was a deprivation of rights without due process of law, the Court chose to review the matter.

Eisenstadt v. Baird, 405 U.S. 645, 31 L Ed. 2d 551, 92 S. Ct. 1208 (1972) was a case involving an Equal Protection

Clause claim and the Court said that because unmarried women were being treated differently from married women, there was a violation of the Equal Protection Clause and a proper suit under 42 USC §1983.

Griswold v. Connecticut, 381 U.S. 479, 14 L Ed. 2d 510, 85 S. Ct. 1678 (1965) the Court held that forbidding the use of contraceptives violated the rights of marital privacy which were within the penumbra of specific guarantees in the Bill of Rights. It was held that this denial by statute was unreasonable under those circumstances.

Hampton v. City of Chicago, 484 F. 2d 602 (7th Cir. 1973) cert. den. 415 U.S. 917, was brought under 42 USC §1983 for damages arising out of an alleged illegal police raid and raised an allegation of conspiracy to directly deprive the plaintiffs of their civil rights. The Court held that the immunity clause would not grant protection against a 42 USC §1983 action under circumstances in which the acts were allegedly directed against the plaintiffs personally.

Hanna v. Drobnick, 514 F. 2d 393 (6th Cir. 1975) involved a city building inspection ordinance and, because the ordinance was not declared unconstitutional, it was presumed to be valid and, therefore, officials acting under color of this authority were not acting in bad faith.

Kelley v. Johnson, 425 U.S. 238, 47 L Ed. 2d 708, 96 S. Ct. 1440 (1976) A policeman sought redress under 42 USC §1983 because county regulations required a certain length of hair while on official duty. The Court held that this was valid as a viable state interest in the appearance of its officers.

Kenosha v. Bruno, 412 U.S. 507, 37 L Ed. 2d 109, 93 S. Ct. 2222 (1973) A suit was brought alleging a §1983 violation because the city had denied a liquor license renewal based on allegations of "nude dancing." This Court held that there was no jurisdiction over the city under §1983 because the city was not a person under that law. This Court held further that the intervention of the Wisconsin Attorney General might have cured the jurisdictional defect and remanded the matter to the lower Court for further proceedings along that line.

Meyer v. Nebraska, 262 U.S. 390, 67 L Ed. 1024, 43 S. Ct. 625 (1923). Suit was brought against a teacher who taught

German to a ten year old who had not passed the eighth grade. This teaching was in contravention of Nebraska statute. The Court held that it was not immoral to teach a foreign language; that there was no injury to public health or welfare; that this was an unnatural restriction of defendant's rights, and the statute was, therefore, unconstitutional. 42 USC §1983 was not involved in that case.

Parratt v. Taylor, No. 79-1734 cert. granted October 20, 1980. Certiorari was granted in this case in a suit brought by a prisoner against prison officials for alleged negligence in his treatment. In this particular case, the acts, if proved, were directed against this prisoner by the officials of the prison while in the course of their duties in caring for him.

Pierson v. Ray, 386 U.S. 547, 18 L Ed. 2d 288, 87 S. Ct. 1213 (1967) held that a factual question had been raised by the pleadings as to whether or not the officers had acted in good faith and remanded this question to the lower Courts to decide this issue.

Procunier v. Navarette, 434 U.S. 555, 55 L Ed. 2d 24, 98 S. Ct. 855 (1978). A prisoner brought suit under 42 USC §1983 claiming unreasonable interference with prisoners' outgoing mail. The state officials claimed qualified immunity. This Court held that state officials were entitled to immunity unless they "knew or should have known" that their actions would violate his federally protected rights or would cause other injury to the respondent.

Roe v. Wade, 410 U.S. 113, 35 L Ed. 2d 147, 93 S. Ct. 705 (1973) involves 28 USC §1253 and did not involve 42 USC §1983.

Stanley v. Illinois, 405 U.S. 645, 31 L Ed. 2d 551, 92 S. Ct. 1208 (1972). An Illinois statute provided that children of an unwed father, on the mother's death, would become state wards and placed in a guardianship. This Court held that to deprive the father of companionship and custody of his children without a hearing was invalid under the Equal Protection Clause, and that the Illinois statute was unconstitutional. The Ohio immunity statute regarding policemen on emergency runs has not been declared unconstitutional by this Court.

CONCLUSION

The United States Court of Appeals for the Sixth District was correct in sustaining the United States District Court for the Northern District of Ohio, Western Division in its dismissal of Petitioner's complaint for the reason that Petitioner failed to establish that her cause of action could be brought under 42 USC §1983 or under any other federal statute and that, in the absence of diversity of citizenship, the United States District Court did not have jurisdiction.

Respectfully Submitted:

RICHARD A. HAMILTON
455 Spitzer Building
Toledo, Ohio 43604
(419) 244-8393
Attorney for Respondent

SERVICE

Three copies of this Brief in Opposition to Petition for Certiorari have been sent by regular U.S. mail to the Attorneys for Petitioner, Benjamin B. Sheerer and Paula Goodwin, 614 Superior Avenue, W., Suite 611, Cleveland, Ohio 44113, this 20th day of March, 1981.

Richard A. Hamilton

RICHARD A. HAMILTON